***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

# 74-2651

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*To be argued by*
IRVING ANOLIK

In The

## United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

*Appellee,*

- against -

ORLANDO MIRANDA, Also Known as "MANOLO,"

*Defendant-Appellant.*

*On Appeal from the United States District Court for the Eastern District of New York*

# BRIEF FOR DEFENDANT-APPELLANT


IRVING ANOLIK
*Attorney for Defendant-Appellant*
225 Broadway
New York, New York 10007
732-3050





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TABLE OF CONTENTS

Contents



TABLE OF CITATIONS

Cases Cited:

Contents

Contents

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Respondent,

-against-

ORLANDO MIRANDA a/k/a "Manolo",

Defendant-Appellant.

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## DEFENDANT-APPELLANT'S BRIEF

### STATEMENT

Defendant-appellant appeals from a judgment of the United States District Court, Eastern District of New York, rendered the 6th day of December, 1974, convicting him of two counts of violating 21 U.S.C. §841(b)(1)(A) and Section 812, after trial before Judd, D.J., and a jury. The Court sentenced the defendant-appellant to concurrent terms of 6 years imprisonment (Sentence minutes p. 8). Appellant is at liberty pending appeal.

## INTRODUCTORY

The case herein is unusual in certain respects. We submit that the activities of the Government in this case indicate either gross negligence or a deliberate violation of the rights of the defendant-appellant in the prosecution of this case. We make this statement predicated upon the uncontradicted fact that one of the most important pieces of evidence, a tape recording of the actual alleged sale of narcotics by the defendant-appellant to a cooperating informer, was lost or perhaps destroyed by Government agents.

The Government used a convict by the name of Gloria Rodas, also known as Gloria Jackson, also known as "Beba" as an undercover informer. It was through her activities that the entire case herein was developed against the defendant. It was "Beba" who befriended Miranda, posing as a customer of a bar near Shea Stadium in Queens County, run by defendant known as the Jaguar Lounge.

Rodas was convicted herself of a drug violation but because she cooperated she received a probationary sentence. It was her incredible testimony that she received no promise whatsoever from the Government and was not even asked to cooperate with them. She claimed

that on her own she decided to cooperate.

Be this as it may, there is strong reason to believe that she would have done anything to endear herself to the Government and to make herself valuable to them by perhaps obtaining information against someone else, and thus her testimony was extremely suspect.

On March 25, 1974, a conversation allegedly took place in an automobile being driven by the cooperating witness, Gloria Rodas ("Beba").

Prior to this meeting with the defendant, "Beba" had testified that she had been equipped with a Kel transmitter by the DEA agents at their headquarters. Several agents, including Agent Castillo, were riding in another vehicle a short distance behind the car in which "Beba" and the defendant were being transported.

The DEA officials said they had given "Beba" $6,000.00 in cash with which to purchase certain cocaine which she expected to get, according to her testimony, from Miranda that day.

It was for the first time during the progress of the trial itself, that the defense counsel learned that a

recording had apparently been made of this essential conversation wherein it was alleged that the defendant gave "Beba" cocaine worth $10,000.00 for $6,000.00 cash. Apparently he agreed to "trust her" for the balance.

Only Agent Castillo in the surveilling car understood Spanish, and he alone, besides "Beba", could state what was being said in the car. Of course the defendant, who later took the stand, categorically denied that anything incriminating occurred during that ride at all.

Be that as it may, it is of course essential that a tape of this sort be made available to defense counsel since it may be a matter of the utmost importance in conducting cross-examination. By some strange coincidence, none of the surveilling agents ever mentioned the existence of this tape in any of their reports or the 3500 material. In addition, Agent Castillo, who alone understood Spanish and claimed that he heard what was being said in the car, never made a report of this conversation at all in any of his 3500 material.

Apparently the tape if it existed, was taken to DEA headquarters on 57th Street in Manhattan and from that point on none of the agents could account for it.

This becomes all the more significant because on April 2, 1974, when an additional $4,000.00 was allegedly given to the defendant by "Beba" at his place of business, there was again a recording made, but it was not audible concerning any conversation in which "Beba" allegedly gave the defendant the additional $4,000.00. The claim was that the tape was just inaudible on that occasion.

Thus we have only the testimony of "Beba", who had very strong motive to lie, plus Agent Castillo, who made no recording or memorandum of what had occurred, and apparently never even wrote in any of his reports anything concerning this tape.

The Government could not explain what had happened to the tape nor could they account for the fact that nothing was made in the way of a memorandum concerning this very important incident.

Defense counsel, of course, maintains that this amounted to spoliation of evidence, or such grossly negligent conduct on the part of the Government, that it warrants reversal for this reason alone.

No good cause is shown, nor are any extenuating circumstances demonstrated, as to why this tape had been lost. The Government was doubly at fault for not having made a full disclosure of this fact in advance of trial, so that the defense could make such investigations and such preparations as it chose to make in view of the serious turn of events.

In addition to this, two other witnesses to several of the very important transactions which occurred during the course of the investigation, namely, incriminating conversations between Rodas ("Beba") and the defendant, were not divulged to defense counsel until well into the trial itself. One of these individuals was known as "Georgie", and the other as "Toni", both women friends of the cooperating informer, Gloria Rodas.

The Government would not divulge the identities of these individuals until almost the end of trial. They never made "Toni" available.

The Government did not offer to produce "Georgie" until almost the end of the trial itself, at which time it reluctantly permitted the defense counsel to speak to "Georgie" in the United States Attorney's office.

The defense counsel valiantly tried to obtain the name of "Toni", another individual who was apparently also present at virtually all of the crucial conversations in connection with this case.

The defense counsel asked the Court for its help in this regard but the Court apparently turned a deaf ear. The net result was that although the Government permitted defense counsel ultimately to learn the name of the individual known as "Georgie", it never gave the whereabouts or true name, for that matter, of "Toni". Whatever names may have been given, could not be verified.

Defense counsel asked for a continuance in order to conduct investigations in view of the very important new information which was suddenly divulged. The Court refused to do this and consequently defense counsel was completely frustrated in defending this client.

We maintain that there was an essential frustration of cross-examination in this case since the Government for all intents and purposes rendered it virtually impossible to properly cross-examine two essential witnesses, namely "Georgie" and "Toni".

In addition, the Court refused to give any instruction that since these witnesses were apparently more within the control of the Government than defense counsel, that the jury would have a right to infer that the reason "Georgie" and "Toni" were not called was that their testimony probably would have been adverse to the Government.

Defense counsel took exception of course to the refusal of the Court to so charge. The Government, however, insisted that the right of subpoena lay with defense counsel equally as with the Government and therefore there was no deprivation of such rights. We submit that this was a disingenuous argument.

We think that the Government acted improperly and, frankly, acted without regard to the essential rights of this defendant in the conduct of the trial.

We submit that the identity of "Georgie" and "Toni" in advance of trial was essential in order to properly prepare for it. In addition, the failure of the Government to even mention the existence of a tape recording which had been lost or destroyed, was a completely irresponsible act and in itself warrants reversal. The divulgence of this information we believe comes not only

within the principle of fundamental fairness, but also within the ambit of Brady v. Maryland, 373 U.S. 83.

## THE PROSECUTION'S CASE

Gloria Rodas, also known as Gloria Jackson, also know as "Beba", revealed that she had been cooperating with the Government following her arrest and conviction of a drug conspiracy based upon her plea of guilty (10, 11).*

Rodas disclosed that she knew the defendant Orlando Miranda and also knew him by a nickname of "Manolo" (11).

She said that she met certain DEA agents on February 28, 1974.

Over objection, the Court permitted a conversation, to which the defendant was not a party, between Rodas and certain agents, wherein she agreed to go to the Jaguar Lounge which was operated by Miranda (13, 14).

She stated that she met Agents Schnackenberg and MacMullen, (14) who worked with her in undercover activities.

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* Numerals in parentheses refer to pages of the official court reporter's minutes of trial, unless otherwise indicated.

On March 1, 1974, at about 10:30 P.M., Rodas went into the Jaguar Lounge in Queens and met a person by the name of "Jack", who in turn introduced her to "Manolo", the defendant (14, 15).

On March 4, 1974, "Beba" agreed to go back to the Jaguar Lounge and it was she who brought up the subject of drugs (16, 17).

Defendant said a friend of his was coming out of jail and allegedly asked her in how much she was interested. When the defendant was told that she was interested in a kilo, he told her that he would let her know (17-19).

On March 21, 1974, "Beba" returned to the Jaguar Lounge and saw the defendant again. On this occasion, she claimed that Miranda told her that he had been in the drug business for a long time and could possibly arrange to sell her drugs (19, 20).

The Court, incidentally, permitted Agent Schnackenberg to remain in the Courtroom during this interrogation, over the objection of the defense counsel (22).

The witness, Rodas, testified that again she met defendant on the 22nd of March, 1974, at 10:30 P.M. at

the Jaguar Lounge. On this occasion, she stated that he told her she could have ten and a half ounces of cocaine at $1,000.00 an ounce (24, 25).

Defendant allegedly said that he was interested in a partnership and was giving her extra value (25).

On March 25, 1974, Rodas recalled that she went to the DEA headquarters on 57th Street and was given $6,000.00 in cash, and was equipped with a transmitter. She was also searched on this occasion (26, 27).

Rodas went to the Jaguar Lounge and later agreed to drive the defendant to a garage where his car was being repaired (29, 30). She had in her car an attache case containing $6,000.00. She allegedly told him to open the case and claimed that at this time he removed the $6,000.00 and put white powder in the suitcase (29-31).

Rodas asserted that she spoke with the defendant in Spanish (31).

Allegedly the defendant agreed to give her $10,000.00 worth of drugs although she only had $6,000.00 in cash with her, reaching the understanding, however, that she would give him the balance shortly (30-32).

On April 2, 1974, the agents again equipped Rodas with a transmitter, searched her, and gave her $4,000.00 in cash. On this occasion she said she went to the Jaguar Lounge and went downstairs to the kitchen where she gave the defendant the balance of $4,000.00 (33-35).

The Court permitted the testimony beyond the period of the indictment, over objection of defense counsel. Thus, Rodas was permitted to state that on April 19, 1974, she again met the defendant at the Jaguar Lounge and on this occasion had additional conversations with him (36-40).*

The agents concocted a plan to have another agent from Puerto Rico, by the name of Octavio, pose as the brother of the witness Rodas. In this guise, the agent Octavio, Rodas, and the perennial "Georgie" and "Toni" met together with Miranda at a bar and exchanged pleasantries. Octavio allegedly thanked the defendant for being nice to his sister, meaning "Beba". Nothing whatsoever

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* It should be noted that the Court instructed the jury that this testimony, beyond the period of the indictment, was solely for the purpose to establish intent and could not be used to convict the defendant. We maintain that this was a completely meaningless and confusing statement to make to laymen jurors. Bruton v. United States, 391 U.S. 123.

was said alluding to drugs. We submit that the conversation was completely sterile so far as drugs was concerned (41-45).

The Court refused to permit defense counsel to obtain the name of a brother who was supporting Rodas (48, 49). In addition, the Court stated that defense counsel could not elicit the name of the other women at the meeting, nor their addresses (55, 56).

Rodas declared that the other woman was "Georgie" who was also convicted of a drug violation and apparently was cooperating with the Government (58, 59). At this point, at a side bar, the Government revealed that the name of this individual was Maldonado (58, 59).

The other woman was named "Toni" and had never been convicted of a crime. This was the only information that was imparted to defense counsel at this time (58-63).

Rodas, despite the fact that she was on the stand testifying without any restraint, refused to state where "Toni" worked, stating it would be perilous. She stated that "Toni" was a friend of hers. The Government objected to any attempt to elicit this information and the Court

went along with the Government's objection, despite the fact that the defendant was facing 15 years in prison (63, 64).

It is significant to note that Rodas declared that she always met "Toni" in the bar when she met the defendant. "Georgie" was there as well on virtually every occasion (74-80). It should therefore be noted that these two individuals were witnesses to essential portions of this investigation and were not merely window-dressing.

The Court warned defense counsel that it could not go into the background of "Georgie" and also cautioned him not to say anything further concerning "Toni" (83, 84).

It should be noted that defense counsel objected on the grounds that while Rodas was searched by the Government, there was no evidence that "Georgie" or "Toni" had been searched, and it might well be that the funds allegedly given to defendant were given to these individuals, and perhaps these individuals gave the drugs to Rodas which were ultimately turned over to the Government (83-85).

The defense elicited the fact from Rodas that on March 23 and March 25, 1974 she had been equipped with

transmitters. The defense insisted that it be given the tapes of the conversation on March 23rd and the other one on March 25th (94, 95). The Government's counsel, however, said that Mr. Todel, the defense counsel, had heard all the tapes. What it did not say was that the tape of March 25th was just not accounted for. It never told defense counsel that apparently the Government had lost, or might even have destroyed, that tape. That tape was the most important piece of corroborative evidence in the entire case since the only transaction where there might have been corroboration of the witness Rodas, was inexplicably missing.

It is also significant that "Toni" and "Georgie" were in the Jaguar Bar on March 25th and could have received the funds from the witness Rodas and might very well have turned over narcotics to her to be given to the Government (99, 100). Only Rodas had been searched (138, 139).

On March 23rd, 1974, she, that is "Beba", already knew that she was going to meet the defendant on March 25th with respect to the alleged drug transaction. Thus she

had plenty of time to make any preparations she wanted.

Ironically, on April 2, 1974, when $4,000.00, according to "Beba", was turned over to the defendant in the kitchen of his lounge, another recording was allegedly made. This, however, did not pick up any part of the conversation wherein allegedly the witness Rodas gave Miranda the additional $4,000.00, representing the balance of the money for the drugs which she had allegedly received from him on the 25th of March, 1974 (104, 105).

Agent Schnackenberg of the DEA stated that on March 25, 1974, he gave Rodas $6,000.00 in United States currency and equipped her with a transmitter. She was also searched at this time (113, 114).

He testified that he, Agent Castillo, and other agents were in another automobile following a car in which the defendant and "Beba" were riding on the 25th of March. Only Agent Castillo could understand the Spanish language among the agents who were surveilling in the other car. The conversations between "Beba" and Miranda were allegedly recorded but Schnackenberg admitted that he had no idea what had happened to these recordings

(117-126).

Schnackenberg merely stated that he doesn't know where the tape of March 25th was and doesn't know who has it or if it exists (137).

He also conceded that on March 25th, "Georgie" went to the Jaguar Lounge together with Rodas, but that "Georgie" was not searched (138, 139).

In addition, he stated that "Toni" was there but that she was not searched either (139).

Agent William MacMullen, testified that he was Supervising Agent for the DEA in charge of this investigation.

He, too, stated that on March 25, 1974, he equipped the witness Rodas with a Kel transmitter and gave her $6,000.00 in cash (151).

Agent Castillo, who alone understood the Spanish language, and other agents, surveilled the meeting between the defendant and Rodas.

The Court permitted the Government to ask "why" questions, thereby permitting the witness MacMullen to give the operation of his mind on direct examination (163-167).

MacMullen stated that he, too, had no idea whatsoever of what had happened to the tapes of March 25th (167, 168).

It should be noted that defense counsel tried to elicit the fact that certain coercion was used on the defendant when he was arrested, but the Court would not permit adduction of this evidence (176).

Octavio Pinol, a DEA agent stationed in Puerto Rico, testified that he had a conversation with the defendant when he posed as Rodas' brother. There was no actual conversation concerning narcotics (186-191). The Court, it should be noted, permitted inferences upon inferences (196).

Agent James Castillo, testified for the Government, and stated that he overheard the conversation and recorded it on March 25th. He, too, could not account for what had happened to the tape of this important conversation between Miranda and Rodas. The tape, he stated, was apparently lost (205-207).

The Court, it should be noted, stated that the Government was, at the very least, "negligent" (207, 208).

Nonetheless, it permitted testimony concerning the conversation (207, 208; 214, 215).

Agent Castillo said that he made no notes whatsoever of this conversation wherein the defendant allegedly stated that he was giving $10,000.00 worth of cocaine to Rodas in exchange for $6,000.00, but that he would expect the balance to be paid by her later since he could not break up the allotment (214-218).

Ironically, Castillo admitted that he too, had never made a memorandum of this conversation. In addition, he stated that defendant told him when he was arrested that he was completely innocent and that he was not involved in drugs at all (224). In addition Miranda stated that he wanted an attorney (224).

When Edward Manning, an agent who made a chemical analysis of the drugs, came to testify, defense counsel objected on the grounds that the drugs had never been identified by the witness Rodas (237).

At this late juncture it should be noted that the Government stated, outside the presence of the jury, that it would now make Iris Maldonado, the alleged

"Georgie", available to defense counsel. Defense counsel insisted upon a continuance, but the Court denied this (239).

The other important witness, "Toni", was not, however, made available, nor could her whereabouts be determined by the Government. At least that is what the Government said (241).

The Court below itself noted that "Georgie" was being made available very late in the trial and that "Toni" was not being made available at all. It denied, however, any motion to dismiss which was made by the defense counsel (253, 254; 262, 263; 264-268).

The record reveals that neither Rodas nor "Georgie" would tell where the important witness "Toni" was. In addition, they would not give her address (267, 268).

The Government, despite the fact that it obviously had plenty of leverage over these indivuduals, used none of it to aid the defense in its important quest for these witnesses.

## THE DEFENSE

Defendant-appellant Orlando Miranda took the stand in his own behalf. He stated that he had been born in Cuba and came to the United States in 1956. He testified that he lived with his mother, father, two brothers and a daughter aged 11. He was not living with his wife but had been awarded custody of his daughter (271-273).

Miranda asserted that he operated the Jaguar Lounge in Queens County near Shea Stadium and held a 51% interest in the company.

He recalled that he met Gloria Rodas, whom he knew as "Beba", in March of 1974, together with her two "sisters", "Georgie" and "Toni". The defendant remembered that "Toni" <u>always</u> accompanied Rodas when she came to visit him (274-276).

"Beba" mentioned the possibility of a partnership and said she could arrange to have a striptease act in his bar, but defendant asserted that he was not interested and told her so (275-277).

The defendant declared that on one occasion he met "Toni", "Georgie", and the witness Rodas at a bar known

as "Las Fuentes Espanola". Exhibit "B" of the defendant depicts the photograph that was taken there of these people, including the defendant (278, 279).

On one occasion, defendant recalled, that he had an automobile accident and "Beba" and her two sisters came over. At this time he requested that "Beba" drive him to the auto shop so he could pick up his car and she agreed to do so (278-281). In the car, "Beba" asked defendant to pick up a case, actually an attache case. Defendant saw a white powder inside and stated that he wanted nothing to do with it. He did not at any time receive any money from "Beba" (280-282).

He asserted that he had not told "Beba" that he intended to go to Puerto Rico, as she had reported, and, as a matter of fact, stated that he had last been in that territory about fifteen months previously (281, 282).

Defendant recalled that on one occasion he was introduced to a person described as the "brother" of "Beba" (282). This was the agent, Octavio.

Miranda declared that he told "Beba" he was not

interested in and did not want cocaine, although she told him that her "brother" had cocaine (282).

Following his arrest on May 31, 1974, Miranda asserted that United States agents of the DEA tried to recruit him as an informer (283, 284).

He denied any involvement in drugs and was threatened that he would be hit by the agents. He refused to cooperate with them since he claimed he was not involved in any way, shape or form and, accordingly, the arrest was processed (283-285). He had no criminal record. He was told by one agent that he would have problems if he didn't cooperate (285).

The clear import of Miranda's testimony was that he was framed in this case (285, 286).

While Miranda conceded that he had several meetings with "Beba" and her "sisters", he categorically denied that he was ever involved in drugs (288-294).

On March 25, 1974, he conceded that he was in an automobile with Rodas, but denied absolutely that he had ever offered to sell her any cocaine. He stated he received no money at all on that occasion. He denied involvement in drugs and insisted that he told "Beba"

he didn't want to deal in anything of that sort. He absolutely contradicted the testimony of Rodas and Agent Castillo who had testified to the alleged conversation in that car (304-307).

The Government insisted that "Georgie" was equally available to the defendant since at the virtual close of their case they had mentioned her name and permitted defense counsel to interview her. Defense counsel however stated he needed a continuance to conduct an investigation before he could determine whether or not to use this witness, but the Court denied such continuance, as we have already indicated. The Court noted that while "Georgie" was made available, it was quite late in the trial and "Toni" was never produced at all. "Toni" was a name which was not really meaningful, especially since both "Georgie" and Rodas refused to give the correct name of this individual (341, 342).

The Court stated that it would not give a missing witness instruction despite the fact that the Government had certainly acted improperly in this case in withholding the information about these witnesses (344).

## ARGUMENT

### POINT I

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED ON THE GROUNDS THAT THE PROSECUTION INEXPLICABLY FAILED TO ACCOUNT FOR A TAPE RECORDING OF AN ESSENTIAL CONVERSATION MADE ON MARCH 25, 1974, UPON WHICH THE ENTIRE CASE TURNED. THIS PREJUDICE WAS EXACERBATED BY THE FACT THAT THE GOVERNMENT DELIBERATELY WITHHELD FROM THE DEFENSE ANY NOTICE OF THE FACT THAT A TAPE HAD AT ONE TIME ALLEGEDLY EXISTED OF THIS IMPORTANT CONVERSATION. THE CONVERSATION OF MARCH 25, 1974, THEREFORE, SHOULD HAVE BEEN SUPPRESSED AS REQUESTED BY THE DEFENDANT.

One of the most disturbing and prejudicial aspects of this case lay in the fact that the Government apparently deliberately withheld from the defense the fact that a tape recording of the most crucial conversation in the entire case, that is the conversation of March 25, 1974, between Rodas and the defendant wherein he allegedly gave her ten ounces of cocaine in exchange for $6,000.00 was lost or destroyed. The prosecution rather "cutely" stated that all the tape recordings which it had, had been turned over to the defense.

It was only during the trial proper that for the first time on cross-examination, the defense learned that a tape recording had allegedly been made of this important March 25th meeting.

We submit that this was clear spoliation of evidence, or at least such gross negligence as to warrant a reversal and dismissal of the indictment, irrespective of any other error in the case. (United States v. Bryant, 448 F.2d 1182 (D.C.Cir.). See also, United States v. Perry, 471 F.2d 1062, 1065; and United States v. Ferguson, 498 F.2d 1001 (D.C.Cir. 1974)).

It should be noted that the Government offered no excuse nor any explanation whatsoever for the loss of this essential tape. There was no "good faith" explanation by the prosecution as to why the tape was not available, nor was there any cogent explanation proffered as to what efforts were made to locate it.

More significant than the foregoing, however, is that the Government withheld any information about the tape from the defense until the middle of the trial when, by sheer luck, defense counsel became aware of

the fact that "Beba" had been wired up. Even the reports of the agents omitted any references to the tape or that it was missing.

The maxim "Contra spoliatorem omnia praesumuntur" requires that there must be a presumption that evidence which has been destroyed or negligently lost would have been unfavorable to the spoliator. (1 Smith, Lead. Cas. 315).

In Kolod v. United States, 390 U.S. 136, at 137-138, the United States Supreme Court indicated that ex parte determinations that evidence would have been duplicative or irrelevant are impermissible.

The argument in Kolod cogently noted:

> "When a government winces at full disclosure in cases such as this it is a government that has lost its taste for freedom."

See also, Katz v. United States, 389 U.S. 347, and Berger v. New York, 388 U.S. 41.

In United States v. Bryant, supra, the Court of Appeals made it abundantly clear that preservation of tape recordings involved in criminal investigations are absolutely essential and, indeed, the Court quotes the

Director of the Federal Bureau of Investigation who ordered that "These tapes should be preserved for ten years in the same manner as documentary evidence". (Bryant, 448 F.2d at 1184).

In the Bryant case, supra, the Court of Appeals affirmed apparently on the principal ground that the District Court had found that the tape in question was almost entirely unintelligible. The Court, however, noted (id. at 1184):

> "The lost tape here had major potential importance to the question of guilt or innocence, since it might have enabled appellants to contradict the testimony of the undercover agent involved in the narcotics transaction. It developed on remand, however, that the Bureau agents had played the tape and found it to be almost entirely unintelligible. The District Court credited the agents' testimony in this regard and concluded that the tape would have been of little use to appellants. There is nothing in the record which could justify our rejection of that conclusion. In the future, of course, investigative agencies will not be allowed to excuse nonpreservation of evidence by claiming that it contained nothing of interest to defendants." (Emphasis ours.)

In the case at bar, however, the contrary is true.

The Government, by its own agents, declared that the tape herein was one of the clearest and most intelligible of any tapes. As a matter of fact, it is the only tape that was ever made where supposedly something incriminating was uttered. The Court will recall that the portion of the April 2nd tape, which supposedly referred to the $4,000.00, representing the balance for the drugs in question which was allegedly given to Miranda, for some strange reason was unintelligible.

As the Court in Bryant points out, the lost tape had "major potential importance to the question of guilt or innocence, since it might have enabled appellants to contradict the testimony of the undercover agent involved. . . ."

In United States v. Perry, 471 F.2d 1057 (D.C. Cir. 1972), the Court of Appeals indicated that where "earnest efforts" are made to preserve crucial materials and "to find them once a discovery request is made", there are possibilities for avoidance of the Bryant rule.

In the case at bar, however, even the Trial Judge felt that the Government had been negligent.

The concurring opinion, however, of Judge Skelly Wright (471 F.2d at 1068) notes that the Perry case involved a situation where the material was lost prior to the Court's decision in the Bryant case and that therefore Bryant was unaffected by the Perry decision. (Cf. United States v. Bryant, 439 F.2d at 652).

It should also be noted that in the Perry case the Court was not dealing with a lost tape. The case nevertheless recognized that where negligence is involved, the Bryant rule must be invoked.

In United States v. Ferguson, 498 F.2d 1001 (D.C. Cir. 1974), the Court considered the fact that a Government informant who was present during a narcotics transaction was not available for the trial. The Court of Appeals, however, distinguished Ferguson from Roviaro v. United States, 353 U.S. 53, noting that in Roviaro the Supreme Court was concerned with the withholding of an informant's identity and in his failure to testify at trial (353 U.S. at 62). The Ferguson Court further noted that in Roviaro the Supreme Court was dealing with the withholding of an informant's identity and in his failure to testify at trial (353 U.S. at 62).

The Ferguson Court further noted that in Roviaro the "informant was an integral part of setting up the crime [353 U.S. at 64] and the court found that in the absence of other witnesses, was the only means by which the appellant could explore any possible entrapment by the Government."

In Ferguson, however, the Court of Appeals noted that the Government represented to the Court that the informant would appear as a witness for the Government and that his identity was being withheld for reasons of his safety (498 F.2d at 1004).

The Court further noted in Ferguson that ten days before trial the Government did reveal the identity of the informant and "disclosed further that the Government had lost touch with him". (Id. at 1004).

In Ferguson the Court of Appeals distinguished inanimate objects, such as recordings, from live witnesses. Thus at 1005 of 498 F.2d, the Court of Appeals explained:

> "This Court called upon the government to provide procedures for the safeguarding of such Jencks material and held that in the future unless such

> procedures were established so that discoverable evidence might be preserved, sanctions for nondisclosure will be invoked. The spirit of Bryant, the dissent says, should be applied to the clearly distinguishable situation with which the Court is confronted in the instant case. We disagree. It is one thing to safeguard such inanimate objects as recordings of conversations. It is quite another to require that government witnesses be secured for the purpose of a future trial. Witnesses, like defendants released on bond, do disappear."

At page 1006 of the Ferguson opinion the Court, referring to Bryant and Perry, further elucidated:

> "In Perry, we said, respecting Bryant, that 'even though Jencks Act information has been lost or destroyed criminal convictions otherwise based on sufficient evidence may be permitted to stand so long as the Government made "earnest efforts" to preserve crucial materials and to find them once a discovery request is made.' (Footnote omitted; emphasis in original)."

This Court should take cognizance, therefore, that in all of the foregoing cases, Bryant, Perry, and Ferguson, the elements of lack of prejudice were obvious and with the exception of Bryant, good faith efforts on the part of the Government had been made.

In the Court below, however, there was obviously an effort made, deliberately or negligently, to withhold from the defense the very knowledge that a tape had ever existed.

This, therefore, was certainly a case where "trial by ambush" was the rule of the day, as will be further explained in the next Point as well. (United States v. Baum, 482 F.2d 1325, 1332 (2 Cir. 1973)).

## POINT II

THE GOVERNMENT WITHHELD THE IDENTITY OF "GEORGIE" AND "TONI" FROM THE DEFENSE DESPITE THE FACT THAT BOTH OF THESE WOMEN WERE ADMITTEDLY PRESENT AT VIRTUALLY ALL OF THE CONVERSATIONS WITH THE APPELLANT CONCERNING DRUG TRANSACTIONS. THE BELATED REVELATION OF "GEORGIE"'S FULL NAME TOWARD THE CLOSE OF TRIAL WAS WORTHLESS AND FRUSTRATING SINCE THE COURT REFUSED TO GRANT A CONTINUANCE TO PERMIT DEFENSE COUNSEL TO PROPERLY CONFRONT THIS WITNESS.

The trial counsel in this case, a former Executive Assistant United States Attorney, Mortimer Todel, Esq., must have had feelings of déja vu while trying this case since he was the same trial counsel as the one who tried United States v. Baum, supra, where this Court reversed the conviction and condemned the Government for withholding the identity of a witness until the virtual end of the trial. (United States v. Baum, 482 F.2d at 1331).

Mr. Todel quite correctly asked for a continuance, as this Court indicated was warranted in the Baum case, when the Government belatedly identified "Georgie". "Georgie" was not some casual, cumulative witness, but, on the contrary, had been present at crucial conversations

involving the very essence of the case. Moreover, if anything smacked of a "trial by ambush" it was the case at bar. Thus, in Baum, this Court explained:

> "The failure to reveal Greenhalgh's identity until he was presented as a witness, confronted the trial judge with the hard choice of interruption of the trial or denial to the defense of a reasonable opportunity of meeting the severe impact of this aspect of the prosecutor's evidence. Such tactics were condemned, and called for the reversal in United States v. Kelly, 420 F.2d 26, 29 (2d. Cir. 1969). In the language of Judge Smith 'The course of the government smacks too much of a trial by ambush, in violation of the rules.' To be sure, Baum's attorney did not make a very forceful showing in the district court of what cross-examination or rebuttal material he could secure. But in a case so close as this, we would rather give the defendant the benefit of the doubt than let the Government reap even a slight possibility of benefit from what we regard as a lack of candor unworthy of a prosecutor.
>
> Here, no reason for nondisclosure was advanced by the government. Greenhalgh's testimony was crucial to the prosecution; it was equally crucial to the defense. Cf. Roviaro v. United States, 353 U.S. 53, 60, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957); United States ex rel Wilkins, 326 F.2d 135, 140 (2d Cir. 1964)" (emphasis ours).

Moreover, there was no reason whatsoever advanced why the identity of this witness could not have been revealed earlier in the trial or, for that matter, immediately before trial, under a proper protective order, as is done time and again in criminal cases.

In addition to the foregoing, the Government obviously made no efforts whatsoever to assist the defense in obtaining the identity of "Toni" who, undoubtedly was also present at many important conversations and who would have been an essential witness since she could have corroborated or contradicted Rodas' testimony. The Government promulgated the impression that it had no control over Rodas and "Georgie".

The defense, therefore, was deprived both of an essential right of confrontation, and also of the ability to subpoena witnesses in his behalf in violation of the Sixth Amendment of the United States Constitution and was thus deprived of due process of law under the Fifth Amendment.

In Smith v. Illinois, 390 U.S. 129, 132, the Supreme Court restated:

> "In Alford v. United States, 282 U.S 267, this Court almost 40 years ago unanimously reversed a Federal conviction because the trial judge had sustained objections to questions by the defense counsel seeking to elicit 'the place of residence' of a prosecution witness . . ." (emphasis ours).

In Smith, supra id. at 131, the Court also noted:

> "The witnesses' [names] . . . address opened countless avenues of in-court and out-of-court investigation. To forbid this most rudimentary inquiry as a threshold is effectively to emasculate the right of cross-examination itself." (Emphasis ours.)

The Sixth Amendment guarantees not only a right to be "confronted with the witnesses against him", but also "to have compulsory process for obtaining witnesses in his favor". Both of these guarantees were denied when the name of these witnesses were withheld. (Brady v. Maryland, 373 U.S. 83).

The Court below was obviously disturbed at what had transpired. We believe, however, that the Court erred in failing to grant the motions of the defense to either dismiss the indictment, or to compel the revelation of both the witnesses' names. It will be recalled that

secrecy was even extended to certain transactions involving Rodas' "brother".

Under the foregoing circumstances, we think it is significant to know that we are dealing with a defendant who has no prior criminal record and who took the stand in his own behalf, and categorically denied complicity in the crime. The tape recording of March 25th, was lost or destroyed, and the witnesses "Georgie" and "Toni", were not available, and we believe that the principles of the Baum case should be applied herein since this is an even stronger case than Baum.

## POINT III

THE COURT IMPROPERLY PERMITTED TESTIMONY BEYOND THE PERIOD OF THE CONSPIRACY AS ALLEGED IN THE INDICTMENT. THE COURT ERRED IN NOT RULING THAT THE JURY COULD INFER THAT THE TESTIMONY OF "GEORGIE" AND "TONI" WOULD HAVE BEEN UNFAVORABLE TO THE GOVERNMENT SINCE THEY WERE NOT CALLED BY THE GOVERNMENT.

The foregoing points we submit warrant reversal. We wish it known, however, that we do not waive the error of the Court below in permitting testimony beyond the period of the conspiracy (36-40). Erber v. United States, (C.C.A. 2) 234 Fed. 221; Collenger v. United States, (C.C.A. 7) 50 F.2d 345; Oras v. United States, (C.C.A. 9), 67 F.2d 463; and Leady v. United States, (C.C.A. 8), 280 Fed. 864.

In addition, since the government's own informers (Beba and Georgie) would not divulge Toni's name, the Court should have granted the defense motion to charge his testimony would have been adverse to the prosecution. The same is true with respect to Georgie, whose identity was withheld until very late in the trial for no cogent reasons.

## CONCLUSION

The judgment of conviction should be reversed.

IRVING ANOLIK
Attorney for Defendant-
Appellant

A 202 Affidavit of Personal Service of Papers LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS: SECOND CIRCUIT

USA,

Appellee,

- against -

ORLANDO MIRANDA,

Defendant-Appellant.

*Index No.*

*Affidavit of Personal Service*

*STATE OF NEW YORK, COUNTY OF* *ss.:*

*I,* James Steele, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 250 West 146th, Street, New York, New York

*That on the* 27th *day of* January *1975 at* 225 Cadman Plaza, Brooklyn, New York

*deponent served the annexed* Appendix *upon*

David G. Trager

*the* *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

*Sworn to before me, this* 27th *day of* January 1975

Robert T. Brin

James Steele

JAMES STEELE

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975